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IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,
Plaintiff in Error,
vs.
PRISCILLA DOBLER,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION.

Reply Brief of Plaintiff in Error.

GALUSHA PARSONS,
EDWARD L. PARSONS,
Of Counsel for Plaintiff in Error.

ALLEN & LAMBORN PRINTING CO., over P. O., Tacoma.

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REPLY BRIEF OF PLAINTIFF IN ERROR.

In their brief, at page five, counsel state that at the trial the company abandoned its defense, that the policy had not been delivered or the first premium paid according to its terms. This is not correct. The company did not and has not abandoned that defense. It was largely a question of fact, and that no error is here assigned or argued in that regard is true. But the defense was not abandoned, it was submitted to the jury.

In considering this case these things must be kept always in mind:

First. The terms of the contract.

The application and the policy constitute the contract which is the basis of this action and from which the rights and liabilities of the parties must be determined. We dislike to be constantly repeating the terms and conditions of this contract, but it is of the first importance that they be kept clearly in mind in considering this case in connection with other cases under different contracts.

Second. The terms of the contract, as contained in the application, constitute a plain limitation of the powers of the agent Stalker.

The terms of the application in this regard in this case, were practically the same as in the application in the case of New York Life Ins. Co. vs. Fletcher, 117 U. S., 519. In its opinion in that case the court said:

"The company, like any other principal, could limit the au-

thority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitation therein expressed."

Third. There is no statute applicable to this case declaring the soliciting agent the agent of the company, notwithstanding the terms of the contract.

Counsel in their brief assume that there is such a statute. Their entire argument is based upon that assumption. But they in no way point out any such statute and there is no such statute in the record. There is no such statute, and this is the first time that it has been in any way intimated or suggested that there was.

The first question discussed in our opening brief is: "Was the parol evidence of the witness Stalker admissible to vary modify or contradict the written contract, or to create an estoppel?"

In their brief, counsel for defendant in error argue that this testimony was admissible for the following reasons:

First. They say (page 10 of their brief) that the questions asked in the application in relation to other assurance did not call for a disclosure of the policy held by the applicant in the Travelers Insurance Company, therefore, it does not matter what the evidence was.

This was the very question which was submitted to the jury. Counsel assume to answer it, and, having answered it to their satisfaction, argue that it does not matter upon what evidence the jury answered it.

Second. Counsel next argue, in sub-divisions B and C of their brief, that this testimony was competent under authority of the case of Continental Insurance Co. vs. Chamberlain, 132 U. S., 304, and kindred cases. This is the only *argument* they offer upon the question of the admissibility of this testimony, and it is based absolutely upon the assumption that there is a statute applicable to this case similar to the statute of the State of Iowa, which was the basis of the decision in the Chamberlain case.

As we have heretofore stated, there is no such statute in this case. This branch of counsels' argument, therefore, has no bearing upon this case.

Counsel argue that because Mr. Stalker was appointed the agent of the company for the purpose of procuring applications for insurance, he was the agent of the company for all purposes in connection therewith, and the company is, therefore, bound by his acts.

Counsel overlook the terms of the contract. There would be force in the argument were it not for the fact that by the terms of the application the powers of the agent were expressly limited. This is the controlling feature of this case. If there had been no limitation upon the powers of the agent, or if such limitation had not been brought to the notice of the assured at the inception of the contract, a very different question would be presented. The law in this regard is well settled, and is clearly laid down in the cases of New York Life Insurance Co. vs. Fletcher, 117 U. S., 519, and Northern Assurance Co. vs. Grand View Building Association, 183 U. S., 308, heretofore referred to.

As stated in our opening brief, it seems to us that the case of Northern Assurance Co. vs. Grand View Building Association, 183 U. S., 308, is absolutely decisive of this case; it is only necessary to apply to this case the rules there laid down.

Counsel do not find much to say about that case, but they do say that the Supreme Court did not intend thereby to overrule or modify the Chamberlain case, because, in the case of McMasters vs. N. Y. Life Ins. Co., 183 U. S., 25, the Supreme Court followed and affirmed the Chamberlain case. Counsels' contention is evidently correct, because of the obvious distinction between the two cases. The decision in the Chamberlain case was based upon the statute of the State of Iowa; it was followed in the McMaster case under a similar statute of the State of Pennsylvania. There was no such statute in the Northern Assurance Co. case.

This is the very distinction between the case at bar and the Chamberlain case, which we have pointed out so often that we fear we will tire Your Honors by the reiteration. The fact that this distinction has been disregarded by counsel and by the lower court is our excuse.

Counsel attempt to draw a distinction between the case at bar and the case of Northern Assurance Co. vs. Grand View Building Association, because of the fact that the company in this case did not offer to return the premium. They again overlook the terms of the contract. The contract provides (Record p. 167): "If any of the answers or statements made are not full, complete and true, or if any condition or agreement shall not be fulfilled as required herein, or by such policy, then the policy

issued hereon shall be null and void, and all moneys paid thereon shall be forfeited to the company."

Moreover, there was a question of fact submitted to the jury as to whether or not any premium had been actually paid.

We do not find in the brief of counsel any argument in support of the ruling of the trial court in admitting the testimony of the witness Stalker, except the attempt to bring this case within the rules laid down in the Chamberlain and kindred cases decided under special statutes. That those cases are not in point in this case, where there is no such statute, must, we think, be manifest. And under the rules laid down in the Northern Assurance Company case it is equally manifest that the parol testimony should not have been received.

Upon the question of the refusal of the trial court to grant the motion of plaintiff in error, for a directed verdict, counsel argue:

First. There is a difference between life insurance and accident insurance.

Second. That the question: "Have you any assurance on your life? If so, where, when taken, for what amount, and what kinds of policies?" did not require a disclosure of the policy held by the applicant in the Travelers Insurance Co.

Third. That the question: "Have you any other assurance?" if it meant anything at all referred only to straight life insurance in life insurance companies. That, at most, it meant nothing more than the first question and required only that the applicant state all the straight life insurance he had.

Cases are cited where it was held, under the terms of the particular contracts there under consideration, that failure to disclose membership in some secret or beneficial order would not constitute a breach of warranty. In not one of the cases cited by counsel was the question asked that was asked in this case, namely: "Have you any other assurance?"

The cases cited by counsel involved the construction of particular contracts, as does this one. The question is, were the answers to the questions asked, full, complete and true? It being now admitted that at the time, the applicant did have the other assurance; that he had a policy which matured upon his death and under which the beneficiary was paid the sum of five thousand dollars. Suppose it had been $100,000. The principle would be the same, and it could not be seriously contended that under the terms of this contract this company was not entitled to know that fact before it assumed an additional risk.

The question was undoubtedly framed to meet just such a case as this. The company was undoubtedly aware that some courts had held that the usual form of question did not require a disclosure of certain forms of assurance. This company wanted to know of all the assurance the applicant held, therefore, it asked the question: "Have you any other assurance?"

Counsels' argument as to the "historical meaning" of the question: "Have you any other assurance?" that it is only to require a complete answer to the preceding question, is answered by one of the cases cited by them. Penn Mutual Life Ins. Co. vs. Mechanics Svs. B. & T. Co., 72 Federal, 413, where, at page 421, the court said:

"In Insurance Co. vs. Raddin, 120 U. S., 183, 7 Sup. Ct., 500, the Supreme Court held that, where the answers to questions were obviously incomplete, the insurance company, by failing to inquire further before issuing the policy, waived any right to complain of such incompleteness; but the court indicated its view that if such an answer was apparently complete, but in fact was otherwise, it was a false answer, and a breach of the warranty of its full truth. Towne vs. Insurance Co., 7 Allen 52, 53; London Assurance vs Mansel, 11 Ch., Div. 363; Bliss, Ins. (2nd Ed.), 189, 190; Phil. Ins., Secs. 550, 565, 567. The answer to such a question contains the necessary implication that there is no other insurance than that stated, and, if there is other assurance, it is as false as if the existence of other assurance were expressly denied."

Let us look briefly at the cases cited by counsel. The cases of Penn Mutual Life Ins. Co. vs. Mechanics S. B. & T. Co., 72 Federal, 413; Fidelity Mut. Life Assn. vs. Miller, 92 Fed., 63; McMaster vs. N. Y. Life Ins. Co., 183 U. S., 25; McClain vs. Insurance Co., 110 Fed., 80; and New York Life Ins. Co. vs. Russell, 77 Fed., 95, were all decided under special statutes similar to that upon which the case of Continental Insurance Co. vs. Chamberlain, 132 U. S., 304, was based.

In the case of Equitable Life Ass. Soc. vs. Hazlewood, 12 S. W., 621, it did not appear that the powers of the agent were in any way limited.

In the case of Palatine Ins. Co. vs. Ewing, 92 Fed., 111, it was held that a "rider" attached to the policy was the consent of the company to other assurance.

In relation to the breach of warranty in the answers to the questions regarding the applicant having consulted a physician, we would simply, once more, call attention to the terms of the contract.

The questions and answers in Part I of the application were:

Q. When did you last consult a physician and for what reason?

A. Do not remember; years ago.

Q. Give name and address of last physician consulted.

A. (No answer).

In view of the undisputed evidence, were these answers full, complete and true; were they literally true?

Here was a plain, simple question, calling for a simple statement of fact. It did not imply that the consultation was with regard to any disease or ailment. Those matters were inquired about in Part II of the application when he was undergoing his medical examination. All that was here wanted was to ascertain when he had last consulted a physician, for whatever reason, and the name and address of that physician. It is simply a question of the construction of this particular contract, as the cases cited by counsel presented questions of the construction of the particular contracts there under consideration.

In the case of Hubbard vs. Mutual Reserve Fund Life Assn., 100 Fed. 719, the court used the language quoted by counsel at pages 51 and 52 of their brief, but counsel omitted the essential part, being the last sentence of the paragraph from which they quote, which is:

"The difficulty, however, is that this qualification has no relation to the facts of the case at bar."

The trial court had directed a verdict for the insurance company, and the judgment was affirmed by the Court of Appeals.

Upon reading the brief of counsel for defendant in error, the thing which impressed us most strongly was, a tendency to disregard the terms of the contract upon which this action is based. From this contract, however, the rights and liabilities of the parties to this action must be determined. It is not enough to say that one of the parties is an insurance company, the other an individual, hence the individual must recover. We must look to their contract. That contract must be enforced under the established rules of law. The insurance company is as much entitled to the protection of the law as is the individual.

Undoubtedly there has been in the past great confusion as to the rules of law applicable to insurance contracts. Sympathy for the individual has, in some cases, led to decisions totally irreconcilable with law or reason. Some courts have gone so far as to disregard the elementary rule of law that parol evidence is inadmissible to vary or contradict a written contract.

But now, it would seem, there should be no further confusion, no further "divergence of decisions." The Supreme Court of the United States has settled the law. The decisions in the cases of New York Life Ins. Co. vs. Fletcher, and Northern Assurance Co. vs. Grand View Building Association, have established for all time the rules of law applicable to this case.

Applying those established rules of law in construing the contract upon which this action is based, in view of the admitted

facts, it at once becomes manifest that there was a fatal breach of warranty in the answers to the questions relating to other assurance. The lower court apparently recognized this conclusion, but thought it could be avoided by creating a new contract, or modifying the written contract, by means of the parol testimony of the witness Stalker.

In many of the States statutes have been enacted providing that a person soliciting an application for insurance, shall be held to be the agent of the company, anything in the application or policy to the contrary notwithstanding.

In other States statutes have been enacted providing that no misrepresentation or breach of warranty shall work a forfeiture of the policy or be ground of defense, unless it relates to a matter material to the risk or contributing to the loss.

There is no such statute applicable to this case.

In the absence of a statute the courts can but enforce the contract made by the parties. The contract must speak for itself, it cannot be modified by parol testimony. Every fact, every statement, every answer, warranted to be full, complete and true, must be so or no recovery can be had.

The law is clear and well settled. It has been established by the highest court in the land. If there is any fault in the law it is not the province of the courts to correct it.

But it is not an unfair or unreasonable law. An insurance company is entitled to protect itself; is entitled to require from an applicant for insurance that he make full, true and complete answers to such questions as may be asked him, and to provide.

that, for a limited time, the validity of the policy shall be dependent upon his doing so. The applicant is under no compulsion, he is at liberty to make the contract or not as he sees fit; but if he does make it he must perform upon his part.

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